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No. 86-847

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, the court of appeals correctly held that petitioner's claimed consequential damages in a breach of contract action were not reasonably foreseeable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 801 F.2d 1295. The opinion of the United States Claims Court (Pet. App. B1-B18) is reported at 7 Cl. Ct. 710.

JURISDICTION

The judgment of the court of appeals (Pet. App. C1) was entered on August 29, 1986, and a petition for rehearing was denied on September 26, 1986 (Pet. App. D1). The petition for a writ of certiorari was filed on Novemer 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks consequential contract damages which it contends were incurred when the General Services Administration (GSA) was unable to vacate leased premises

for approximately ten months after petitioner terminated GSA's lease. The United States conceded liability for the fair market rental value of the space for the entire period. This amount—calculated at a rate substantially in excess of the rent specified by the lease for its expired term—was stipulated and agreed upon by the parties and judgment was entered accordingly (Pet. App. A2-A3 n.4). Petitioner, however, claims an additional $814,723, plus attorney's fees, which it contends was incurred when the major tenant in the building, Cities Service Company, exercised an option to cancel its entire lease if it could not also timely occupy the space held by GSA (*id.* at A2-A3). Petitioner claims, for the entire space covered by the Cities Service lease, real estate commissions incurred in obtaining seven new tenants, refurbishment expenses related to the new tenants, and increased operating costs (*ibid.*).

1. The lease at issue was executed between GSA and Diversified Building Equities, Inc. (Diversified) on December 28, 1973 (Pet. App. B2). GSA leased 8,197 square feet of space, subsequently increased to 14,074 square feet, in the Pinehollow Office Building in Houston, Texas (*ibid.*). The initial lease term was from March 1, 1974, through February 28, 1979 (*ibid.*), with an option for GSA to extend for three years (Pet. App. B3). Either party could terminate during the extension period upon 90 days' notice (*ibid.*). Petitioner purchased the building in 1974, thereby assuming the lease (*ibid.*).

GSA exercised its renewal option on January 5, 1979 (Pet. App. B3). Petitioner gave notice of termination on March 27, 1979, effective June 27, 1979 (*ibid.*). Because of the time required to obtain new office space, GSA was unable to vacate the premises by that date. Petitioner, by letter dated July 17, 1979, requested that GSA vacate the premises, and advised GSA for the first time that it was negotiating a lease for a major portion of the Pinehollow

Building with another, unnamed, tenant contingent upon GSA's vacating its floor space by October 1, 1979 (*ibid.*).

Petitioner entered a new lease with Cities Service Company on November 30, 1979, effective from November 1, 1979, through June 30, 1986 (*ibid.*). Petitioner did not inform the government of the new lease at this time (Fed. Cir. App. 423). The lease was for 79,533 square feet, which included 48,274 square feet already leased by Cities Service Company, the 14,074 square feet occupied by GSA, and 17,185 square feet in additional space (Pet. App. B3). The lease allowed Cities Service to terminate for all leased space if the square footage occupied by GSA was not available by February 1, 1980 (*ibid.*). Cities Service exercised its option to terminate on March 1, 1980, after which petitioner advised GSA of the existence of the lease (Pet. App. B4; Fed. Cir. App. 423). Cities Service vacated its prior leased space on July 31, 1980 (Pet. App. B4). GSA vacated its space on April 15, 1980 (*id.* at B3).

2. The Claims Court granted summary judgment to GSA on petitioner's claim for consequential damages. The court held, in relevant part, that consequential damages under federal contract law are recoverable only if reasonably foreseeable at the time the lease agreement is executed (Pet. App. B14). On the facts of this case, the court found no such foreseeability. The government could not have anticipated that its failure to vacate 14,074 square feet would result in lost rental of an additional 65,459 square feet, or that petitioner would be required to subdivide the total property, with accompanying expenditures, among seven new tenants (*ibid.*).

The court of appeals affirmed on the issue of foreseeability (Pet. App. A10-A12). The court stressed that petitioner did not even begin negotiating with Cities Service until after exercising its option to terminate GSA (*id.* at A11). The court of appeals concluded that "[w]ith this timing, Prudential has failed to show that a material

issue of fact existed concerning the government's ability to foresee Prudential's dealings with Cities Service or any other tenant occupying such a large part of the Pinehollow Building at the date of execution of its lease in 1973" (*ibid.*).

ARGUMENT

The court of appeals correctly applied federal contract law in holding, under the facts of this case, that petitioner's claimed consequential damages were not reasonably foreseeable. This decision does not conflict with any decision of this Court or of any other court of appeals. Review by this Court therefore is not warranted.[1]

1. Petitioner argues that the lower courts erred in judging the foreseeability of its claimed consequential damages as of the time the lease agreement was executed.

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[1] As its principal holding, the Claims Court concluded that it had no jurisdiction over petitioner's claim for consequential damages. The court noted that the Tucker Act, 28 U.S.C. 1491(a)(1), grants it jurisdiction only over claims based on express or implied contracts with the United States (Pet. App. B6). The court found no express provision in the lease requiring GSA to vacate the premises upon its termination (*ibid.*). Nor did it find any meeting of the minds such as would be necessary to imply in fact such a provision (*id.* at B7). Noting that "the United States always has the right to occupy premises for public purposes merely in return for fair rental value or just compensation" (*id.* at B8), the court was unwilling to read into the lease any agreement that would grant petitioner consequential damages for a holdover above and beyond the fair rental value.

The court of appeals held to the contrary that an implied duty to vacate is an inherent part of every fixed term lease agreement absent an explicit provision to the contrary (Pet. App. A7). Therefore, it concluded, GSA's failure to vacate upon termination of the lease was a breach of contract cognizable under the Tucker Act (*id.* at A9). There is no need for this Court to consider whether that conclusion was correct since the court of appeals correctly rejected petitioner's claim for consequential damages on other grounds.

Instead, petitioner urges, the foreseeability of damages consequent upon a breach of contract should be judged as of the date of the breach. That contention, however, is foreclosed by settled federal law to the contrary.

It is fundamental that contracts to which the federal government is a party "present questions of federal law not controlled by the law of any State." *United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943); *Forman* v. *United States*, 767 F.2d 875, 879-880 (Fed. Cir. 1985).[2] Under federal contract law, a plaintiff may recover only those damages which are reasonably foreseeable at the time the contract is executed. *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903); *Northern Helex Co.* v. *United States*, 524 F.2d 707, 714-715 (Ct. Cl. 1975), cert. denied, 429 U.S. 866 (1976). As stated by this Court in *Globe Refining Co.*, 190 U.S. at 544, the measure of damages "depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made." The consequence "must be contemplated at the time of the making of the contract" (*ibid.*).

Instead of addressing this federal contract law, however, petitioner asserts (Pet. 5-6) that the courts below erred in not applying what petitioner perceives to be the prevailing rule among state courts, as expressed by the Restatement (Second) of Property § 14.6 (1977), that foreseeability is to be determined at the time of breach. But petitioner's novel effort to rely on the law of a number of states, rather than the law of a particular state, is

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[2] Lease agreements clearly fall within this principle. *Forman* v. *United States*, 767 F.2d 875, 879-880 & n.6 (Fed. Cir. 1985); *Keydata Corp.* v. *United States*, 504 F.2d 1115, 1123 (Ct. Cl. 1974).

equally incompatible with this Court's holdings that government contract issues present questions of federal, not state, law. See, *e.g.*, *United States* v. *County of Allegheny*, 322 U.S. at 183. Petitioner's approach would require extensive analysis in each case, as to each contract issue, to determine what, in the court's view, constitutes the prevalent or appropriate state court position. It is precisely this "introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls," which the creation of a uniform body of federal contract law was designed to avoid. *Ibid.*; *Clearfield Trust Co.* v. *United States*, 318 U.S. at 367. The Claims Court is, of course, free to consult state court decisions or the Restatement, as the court of appeals did here (Pet. App. A10), but it is under no obligation to adopt—as the rule of federal contract law—a given state approach because of a perceived majority consensus.

Petitioner also fails to offer any substantive reasons for preferring the Restatement standard over the current federal rule. That longstanding rule provides a manageable and accurate mechanism for judging the extent to which the respective parties agreed to be bound. *Globe Refining Co.*, 190 U.S. at 543-544.[3]

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[3] In any event, the consequential damages claimed by petitioner in this case were not foreseeable even at the time of the breach. As the court of appeals concluded, petitioner did not begin negotiations with Cities Service until after petitioner had exercised its termination option on March 27, 1979 (Pet. App. A11), and it provided no notification to GSA of those negotiations until July 17, 1979, after GSA had breached the contract and become a holdover tenant (*id.* at B3). Furthermore, petitioner did not advise GSA that it had signed a new lease with Cities Service, or of the terms of that lease, until after Cities Service had terminated (Fed. Cir. App. 423). GSA could not be expected to divine unaided petitioner's peculiarly vulnerable position with respect to Cities Service. Thus, even on its own theory, petitioner is not entitled to the relief sought. These considerations, of course,

2. Petitioner also claims (Pet. 8-10) that the record was insufficient on the question of foreseeability to permit resolution by summary judgment. However, petitioner fails to cite any material facts in dispute. The court of appeals correctly held that the "party opposing summary judgment must show an evidentiary conflict on the record by a counter statement of facts or facts set forth in detail by a knowledgeable affiant" (Pet. App. A12). This standard comports fully with this Court's decision in *Celotex Corp.* v. *Catrett*, No. 85-198 (June 25, 1986).[4] Petitioner conspicuously failed to meet its burden.

Petitioner's mere assertion that GSA should have foreseen that failure to vacate 14,074 square feet would cost petitioner not only the fair rental value of that space, but also lost rent, real estate commissions, refurbishment expenses and operations costs for more than 65,000 additional square feet, or some 465% more space, is wholly untenable. By rental of a single floor, petitioner would require the government to anticipate damages encompassing an entire six-story building and seven new tenants. The court of appeals correctly held that such damages "were too remote and speculative, i.e., not natural and probable

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apply with even more force to petitioner's alternative suggestion (Pet. 7) that foreseeablity in this case be determined as of GSA's January 5, 1979, lease renewal, rather than the original December 28, 1973, execution date.

[4] Petitioner asserts (Pet. 8) that review should be granted because "this Court will have the opportunity to explain the differences between" *Celotex Corp.* and *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970). The Court in *Celotex Corp.*, however, fully addressed the earlier *Adickes* decision, holding that the moving party, under that decision, need not demonstrate the absence of a genuine issue of material fact, but must show only "that there is an absence of evidence to support the nonmoving party's case." Slip op. 7. The nonmoving party, in turn, must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 5.

consequences flowing from the government's holdover" (Pet. App. A11 (citing *Northern Helex Co.* v. *United States*, 524 F.2d at 720)).

3. Finally, petitioner asserts (Pet. 8) that summary judgment was premature in this case because further discovery was necessary to develop disputed material facts relevant to its claim that the damages were foreseeable. Petitioner even claims a conflict with decisions in other circuits holding that summary judgment is inappropriate where relevant discovery is necessary. This alleged conflict dissolves, however, once it is recognized that petitioner has provided no substantiation for its claim to need further discovery. Petitioner never specifies what discovery is desired, how such discovery could be relevant, or how it might change the result in this case.[5] As the court of appeals concluded (Pet. App. A11-A12), all the necessary and determinative facts are already in the record in this case. It is well settled that "[s]ummary judgment need not be denied merely to satisfy a litigant's speculative hope of finding some evidence that might tend to support a complaint." *Pure Gold, Inc.* v. *Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984).

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[5] Stretching relevance to the breaking point, petitioner claimed below (Fed. Cir. Br. 26 n.24) that it needed discovery to determine whether the government, as tenant, has ever rejected or terminated a lease because the premises could not be made available on time; and whether the government "has ever been in the situation described above as a landlord or potential landlord." Understandably, petitioner does not pursue these particular contentions here.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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